

SCOTT SCHMIDT
CENTURY EL CENTRO CELLULAR CORP.

IBLA 99-134

Decided January 13, 2003

Appeal from a decision of the El Centro, California, Field Office, Bureau of Land Management, assessing annual rental for communications site lease CA-38638.

Vacated and remanded.

1. Appraisals--Communication Sites Rent--Rights-of-Way:
Appraisals

A BLM decision increasing annual rental for a communications site lease, as determined by appraisal in accordance with 43 CFR 2803.1-2(d) (7) (iv), will be set aside where BLM fails to provide an administrative record adequately supporting its fair market rental value determination.

2. Appraisals--Communication Sites--Rent--Rights-of-Way: Appraisals

Where rental of a Federal communications site lease must be determined by appraising its fair market value, such appraisal must be prepared under standards governing Federal appraisals. The appraisal is not governed by the measure of schedule rent established at 43 CFR 2803.1-2(d) (3).

APPEARANCES: Patrick M. Pace, Esq., Brawley, California, for appellant; Gregory Thomsen, Field Manager, El Centro (California) Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Scott Schmidt and Century El Centro Cellular Corp. (CEC) have jointly appealed the November 25, 1998, rental determination decision of the El Centro (California) Field Office, Bureau of Land Management (BLM), setting

rental for communications use lease 1/ CA-38638 for calendar year 1999 at \$47,000.

The lease in question was issued to CEC on September 28, 1998, and authorizes use of Federal lands for the "Black [Mountain] Communication Site," which actually consists of two separate sites. (Communications Use Lease CA-38638, Ex. A-1.) Site 1 is 80' x 125' and is located in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 12, T. 13 S., R. 20 E., SBM. It contains one 40' x 15' metal building, one 106' guyed tower, one 70' guyed tower, and one 6' x 10' concrete generator foundation. Site 2 is 100' x 100' and is located in the E $\frac{1}{2}$ SE $\frac{1}{4}$, sec. 2, in the same township. 2/ It contains one 40' x 15' concrete block building and one 198' guyed tower. Authorization includes access via Black Mountain Road and spur to each site. (Communications Use Lease CA-38638, Ex. B.)

Although communications use lease CA-38638 was not issued until September 1998, CEC had applied in October 1996 for a single right-of-way to replace two older grants authorizing CEC's use of the same sites, R-06674 (Black Mountain #1) and CA-12236 (Black Mountain #2). In September 1997, BLM notified CEC that, "[u]nder the new regulations[,] multiple facilities owned by a single entity on the same mountaintop will be treated as one facility and authorization. Accordingly, we have consolidated Black Mountain Sites #1 and #2 under one authorization." (BLM Decision dated Sept. 10, 1997, at 1.) Thus, although the single lease (or "right-of-way") was not formally issued until September 28, 1998, the sites were appraised together under serial number CA-38638 in December 1997 and February 1998. 3/

The Yerke Appraisal concerned the fair market rent of two El Centro area communication sites, Black Mountain (the mountaintop containing the sites at issue herein) and Pot Holes. It noted:

Information on leasing activity was gathered from primary research and augmented by data supplied by a telecommunication consultant retained by the appraiser. The consultant obtained confidential information which is presented in generic form. Sufficient information was generated to estimate a Fair Market Rent for each of the separate telecommunication users.

1/ We note that we perceive no legal distinction between a "communications use lease" and a communications site "right-of-way" as the latter term is used in Departmental regulations. The terms are used interchangeably herein.

2/ The sites are located in cornering sections. It is not immediately clear how far apart they are situated. The record indicates that both sites are situated on Black Mountain.

3/ The Restricted Appraisal Report of David J. Yerke, a BLM contractor, dated Dec. 20, 1997 ("Appraisal" or "Yerke Appraisal"), discussed at length below, incorrectly stated that the "R/W Grant Date" was "1996." (Yerke Appraisal at 5.)

(Yerke Appraisal at 2 (emphasis supplied).) A summary of that "confidential information" appears in two tables in the report, one for "private consultant data" and one for "appraiser data." That data consists of listings of the annual rent evidently paid by lessees of telecommunication sites, broken down in Table I by time period for leases other than cell site, broadcast, and miscellaneous and for cell sites and enhancers, and in Table II by use type (cellular, microwave, PCS, CMRS/PMRS, or Radio Beacon). No details are provided about the geographical location of any of the leases or the specific services leased.

The Appraisal announced the following conclusion concerning the fair market rental of the leases in question:

Fair Market Rental Conclusion

After analyzing the data presented in the previous section along with the other information gathered during the course of the assignment, the annual Fair Market Rent for the telecommunication uses in the El Centro Area are estimated as follows:

- Microwave: \$6,500
- CMRS/PMRS \$10,000
- Cellular/FM/TV \$15,000

Id. at 4.

The Appraisal noted as follows concerning "co-located use," that is, use of leased sites by parties other than the lessee:

A survey of the market revealed that the rent charged for co-located users by the lessor ranges from 25% to 50% of the gross lease rate. Market rental rates for co-located users range from an average of \$2,000 to \$8,000 per year.

Since there is no mechanism in place whereby the lessee must divulge the rental rates of their subtenants, a base rent is established. A base rent of \$1,000 per co-located user is adopted for this analysis. This is based on the assumption that the average co-located user pays about \$300-\$400 per month; 25% of this rate is roughly \$1,000 in annual rent.

Id.

The Appraisal set out its conclusions regarding the evaluated leases on a summary sheet attached to the Appraisal:

A summary sheet is provided on the following page which includes both factual information on the subject properties and the extension of the estimated Fair Market

Rent conclusions. In this study we have found that neither of the subject propert[ies'] Fair Market Rent[s] exceeds the "five times" threshold amount of the contract rent. Because of this, no further analysis of the sites is conducted.

Id. (emphasis supplied). The summary sheet attached to the Appraisal, entitled "Subject Information and Fair Market Rent Conclusions," sets forth the following data concerning CA-38638:

Term: 20 [years]; Base Rent: \$2,575; Tenant Rent: \$257.50;
 Total Rent: \$2,832.50; Size: 10,000 square feet; Use Type:
 Cellular, PMRS; Market Base Rent: \$15,000; Market Tenant Rent:
\$26,000; [4/] Total Market Rent: \$41,000.

Id. at 5 (emphasis supplied).

We note that Yerke expressly found that the fair market rental did not exceed the "contract rent" by more than "five times." This is puzzling in view of the fact that the total fair market rental he set for lease CA-38638 (\$41,000) was far more than five times greater than the total schedule rent (\$2,832.50), and, for that matter, the base fair market value rental (\$15,000) was more than five times greater than the total schedule rental. 5/ However, what is significant is that, once Yerke concluded (rightly or wrongly) that the "five times" threshold had not been met, he curtailed his analysis of the sites. As a result, Yerke's Appraisal did not purport to determine the amount of rent that BLM should charge CEC. BLM nevertheless relied on Yerke's Appraisal for these purposes, which, we hold, was error.

On February 17, 1998, the California State Office Review Appraiser issued his review of Yerke's Appraisal (Review Appraiser's Memo). He noted therein that, as reviewer, he had to "form an opinion as to the appropriateness of the appraisal methods and techniques used and whether the analyses, opinions, and conclusions in [the] report are appropriate[] and reasonable and develop reasons for any disagreements." (Review Appraiser's Memo at 1.) The memo states:

In [the] report, [the] appraiser provides estimates of the Fair Market Rent for users of telecommunication site facilities on mountaintops referred to as Black Mountain and Pot Holes. Per instructions of [the] contract issued by [the] BLM Contracting Officer, if the estimates of

4/ As Yerke had adopted \$1,000 per co-located use, it appears that he found that there were 26 such users of the site in 1997.

5/ Although no explanation is provided, it appears that Yerke compared the total schedule rent for all sites on Black Mountain (adding together the schedule rental for all 10 grants there and coming up with \$38,624) to the total "market rent" for Black Mountain (adding the 10 market rents together to come up with \$145,000). \$145,000 is less than \$38,624 times five.

market rent did not exceed the current contract rent by "five" times[,] a complete appraisal report was not required.

Id. at 1. Since Yerke had expressly concluded that his estimates of market rent did not exceed this "five-times" threshold, such that (in Yerke's words) "no further analysis [had been] conducted," the Review Appraiser was well aware that Yerke had not prepared (in the Review Appraiser's words) "a complete appraisal report."

The Review Appraiser adopted Yerke's methodology for estimating fair market rent for a co-located user at \$1,000 per user annually. He also adopted the "final market rent conclusions" for CEC's lease (among others) that were set out on Yerke's summary sheet, listing a total rent of \$41,000 for the site. Id. at 3. He stated:

Based on my review, I conclude that [the] appraiser's estimate of "Fair Market Rent" for existing telecommunication site users with facilities located on Black Mountain and Pot Holes in the El Centro Resource Area * * * [is] reasonable and market supported. The rental estimates are based entirely on the revenue producing portion of [the] respective properties. The appraiser used excellent [judgment] and [a] good rationale in arriving at his findings and conclusions. His research and market analysis of the telecommunication use industry was excellent. As a result, his estimates of market rent for BLM leases with sites on Black Mountain and Pot Holes are approved for use by the BLM for the purpose of the appraisal which is to determine if market rent exceeds the "schedule rent" by five (5) times.

Id. at 4. Thus, the Review Appraiser plainly approved use of Yerke's Appraisal for the limited purpose of "determin[ing] if market rent exceeds the 'schedule rent' by five (5) times." He concluded, based on Yerke's Appraisal, that it did:

It appears from [the] appraiser's analysis of data and conclusions of market rent that of the 10 authorized users of sites on Black Mountain only two (Century Cellular and [Lodestar] Towers) exceed BLM's contract rent by the threshold of five times.

Id. (italics in original).

Thus, BLM was aware that Yerke had not prepared a "complete appraisal report." We note that the Review Appraiser's memo added nothing substantive to Yerke's Appraisal. Nor are we aware that any further appraisals were undertaken prior to assessing rental on the lease in 1998.

On November 25, 1998, BLM issued the decision under appeal herein, holding as follows:

The appraisal was completed in December 1997 and approved in February 1998. From the data collected there are three separate groups of uses that seem to have common rental rates in the area of the subject properties[:] 1) microwave, 2) CMRS/PMRS or 3) Cellular/FM/TV. Based on the information gathered during the course of the appraisal process, the annual Fair Market Rent for the telecommunications uses at the Pot Holes and Black Mountain are as follows:

- Microwave \$ 6,500
- CMRS/PMRS \$10,000
- Cellular/FM/TV \$15,000

(BLM Decision dated Nov. 25, 1998, at 1.) Although it did not specifically so state at this point in its decision, BLM adopted \$15,000 as the "appraised value" of CEC's site and based its assessment of rental in part on that figure.

BLM's decision continued:

These rates only include the ground lease portion of the telecommunication site. Some of the improved telecommunication sites have co-located users that have either erected their own facilities or are using antenna and/or vault space. [The appraiser's survey of market revealed that rent charged for co-located user[s] by the lessor ranges from 25% to 50% of the gross lease rate. Market rental rates for co-located users ranged from an average of \$2,000 to \$8,000 per year. Since there is no market-driven mechanism in place where the lessee must divulge the rental rates of subtenants in the subject properties, a base rent of \$1,000 per co-located user was concluded. It is based on the assumption that the average co-located user pays about \$300-\$400 per month; 25% of this rate is roughly \$1,000 in annual rent.

Id. Thus, BLM adopted an assessment of \$1,000 per year for each "co-located user" of the site.

BLM outlined the regulatory mechanism for assessing rental for a communication site right-of-way:

The determination of calendar year 1999 rental for the individual communication site rights-of-way at the selected sites shall be in accordance with the regulations at 43 CFR 2803.1-2. Using information contained in the certified inventory provided by the right-of-way holder, rental must be calculated using (1) the schedule, and (2) the approved appraisal. If the rental value arrived at using the appraisal exceeds the rental arrived at using the schedule by five times (43 CFR 2803.1-2(d)(7)(iv)), the

rental must be assessed based on the appraisal. Otherwise, rental will be assessed based on the schedule.

Id. at 2. BLM concluded:

The determination under the 1999 rental schedule established the rental for your Black Mountain site at \$2,944.03 for calendar year 1999. Since the appraised value of \$15,000 plus \$1,000 for each co-located user exceeds this schedule amount by the applicable threshold, the rental shall be assessed using the appraisal. Therefore, the 1999 rental amount due for your Black Mountain site is \$47,000. [6/]

Id.

CEC appealed this decision. By order dated February 23, 1999, we granted a stay of the effectiveness of BLM's decision pending our consideration of its appeal.

[1] It is well established that section 504(g) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1764(g) (1994), requires the holder of a right-of-way to pay annually, in advance, its "fair market value" as determined by BLM. 43 CFR 2803.1-2(a). As set out more fully in Lone Pine Television, Inc., 158 IBLA 86, 88-90 (2002), Departmental regulations were amended in 1995 to allow the amount of annual rental to be determined by "rental payment schedules." See 43 CFR 2803.1-2(d). However, under 43 CFR 2803.1-2(d) (7) and 2803.1-2(e) (1), if BLM finds that an appraisal or other reasonable method supports a conclusion that the site should command a rental value of more than five times the schedule value, comparative market surveys, appraisals, or other reasonable methods may be used to determine rental value. Lone Pine Television, Inc., 158 IBLA at 90.

A BLM decision increasing rental above the schedule rent because the appraised rent exceeds the schedule rent by more than a factor of five must be vacated where the appraisal fails to establish sufficient familiarity with the communications site being appraised and the communications use on it. Id. at 99 (appraisal fails to establish sufficient familiarity with the site being appraised or to disclose information regarding the comparable data utilized); Kitchens Productions, Inc., 152 IBLA 336, 343-44 (2000) (appraiser failed to conduct on-the-ground inspection of property being appraised). In the present case, BLM elected to adopt an appraisal that, by its own terms, stopped short of what the appraiser deemed necessary to establish fair market value, because the appraiser declined to assemble more information once he determined (rightly or wrongly) that the "five times" threshold had not been met.

6/ This evidently represents \$15,000 for the "annual Fair Market Rent" for CEC's use plus \$1,000 for each of 32 alleged "co-located users."

The fact that Yerke's Appraisal expressly states that no further action would be taken convinces us that the Appraisal was not intended to establish fair market value. Indeed, it falls short of what we have required in such an appraisal in the past. We have approved BLM's use of the comparable lease method of appraisal. Richard Campbell, 137 IBLA 280, 285 (1997); Idaho Wireless Corp., 120 IBLA 172, 173-74 (1991); Big Sky Communications, Inc., 110 IBLA 213, 214 (1989). We have upheld BLM rental determinations based on appraisals where BLM has identified private leases that are comparable to the right-of-way being appraised in terms of the various market factors affecting rental value. However, such approval has been with the understanding that, to the extent that the factors are dissimilar, BLM must disclose the differences and their impact on value and make adjustments in value to account for the differences. The appraisal on which BLM relied was not adequate, probably because it was not intended to determine fair market rent, but only to estimate it.

Our problem with that Appraisal is that neither it nor BLM's case record identifies the comparables used. It was not made clear whether the private leases cited therein, in fact, fit into that category of use. The present record does not support a conclusion that those private leases are comparable in terms of the various other market factors which normally affect rental value, including location of the lease, availability of utilities, access, population served by the leased communications site, and terms and conditions of the lease. The information that is presented shows that there is a broad range of rental rates associated with leases apparently involving the same communications use. The disparity of rates ^{7/} strongly suggests that other factors account for those widely divergent rates. However, we do not even know how these leases compare in terms of these factors and thus cannot judge whether the leases are truly comparable to the subject right-of-way.

We are unable to determine which private leases used for cellular telephone purposes among the large range of rental rates are most comparable to the subject right-of-way and where in either or both of those two ranges the appropriate fair market rental value of the right-of-way might be found. (Yerke Appraisal at 2-3.) Compare with Union Pacific Railroad Co., 114 IBLA 399, 403-05 (1990). By adopting the average of the rental rates, BLM tacitly held that the subject lease falls at the higher end of the range based on what the lease provides and other relevant factors cited above. Unfortunately, there is nothing in the record supporting that conclusion. It is thus possible that the subject right-of-way is more comparable to the leases on the lower end of the range.

We cannot explain the basis for BLM's adopting a fair market rental value of \$15,000 per year for the base value of the subject right-of-way, given the broad range of rentals attributable to the comparable private leases. BLM's appraisal method cannot be affirmed where the range of annual rental values for comparable leases is so wide as to make the

^{7/} The Yerke Appraisal lists rates ranging from \$600 to \$44,552 per year.

concept of a "typical" site, the rental of which is the basis for valuing a BLM right-of-way, of doubtful relevance. See Mountain States Telephone & Telegraph Co., 109 IBLA 142, 146 n.6 (1989), citing High Country Communications, Inc., 105 IBLA 14, 17 (1988). We cannot discern how this rental value was derived from any of the comparable lease data.

[2] We note also that the Appraisal on which BLM relied appears to have been affected by the measure of schedule rental established in Departmental regulations at 43 CFR 2803.1-2(d) (3), such that his estimate of fair market value (even for the limited purpose of determining whether the "five times" threshold was met) was defective. Yerke stated:

Since there is no mechanism in place whereby the lessee must divulge the rental rates of their subtenants, a base rent is established. A base rent of \$1,000 per co-located user is adopted for this analysis. This is based on the assumption that the average co-located user pays about \$300-\$400 per month; 25% of this rate is roughly \$1,000 in annual rent.

(Yerke Appraisal at 4.) Yerke presumed that each co-user paid about \$300 to \$400 per month, or about \$3,600 to \$4,800 per year. Without explanation, he applied a 25-percent factor to that figure, reducing it to \$900 to \$1,200 per year, evidently adopting \$1,000 as a low-side compromise. ^{8/} BLM adopted this valuation technique in assessing rent for the site.

Our problem is that we find no basis for that 25-percent factor. In Lone Pine Television, Inc., supra, wherein Yerke adopted the identical

^{8/} Yerke's methodology employed two separate factors, both of which mention 25 percent. Yerke noted that "[a] survey of the market revealed that the rent charged co-located users by the lessor range[d] from 25% to 50% of the gross lease rate." (Yerke Appraisal at 4.) We gather that the "gross lease rate" is the amount paid by the principal user. Yerke further assumed (presumably based on the data from his market survey) that the amount of rent charged the co-located users ranged from about \$300 to \$400 per month, or \$3,600 to \$4,800 per year.

In assessing the amount each such co-located use contributed to the fair market value of the lessor's lease, Yerke applied a second factor, namely, 25 percent of the average amount of rent charged each co-located user. That meant that the value of each co-located use, according to Yerke's methodology, was 25 percent of the amount of rent charged co-located users (on average); that is, 25 percent of 25 to 50 percent of the amount paid by the principal.

Yerke provided no supporting data from such a survey that would support his conclusions as to the amount of rent that was charged co-located users or its percentage relationship to the amount paid by the principal user. Nor, as discussed below, is any explanation provided for why he adopted 25 percent of that amount in assessing the fair market value of co-located uses on the underlying lease.

practice chosen herein in circumstances described in identical terms for valuing co-located uses, we stated as follows concerning that practice:

The appraiser and BLM, in adding \$1,000 in rent for [the lessee's single] tenant, appear to confuse the schedule rental rates established at 43 CFR 2803.1-2(d) (3) with accepted appraisal methodology for determining rental value. It is true that the schedule rent permits additional and incremental values to be added for tenants. The regulation at 43 CFR 2803.1-2(d) (7) establishes that, except in certain circumstances, BLM will use the schedule. If BLM uses the schedule, it chooses the principal use after identifying all uses and determining which use the schedule identifies as the most valuable use. It adds to this schedule amount 25 percent of the schedule value of each secondary "use." 43 CFR 2803.1-2(d) (3).

However, if a determination is made under subsection (d) (7) (iv) that an appraisal is to be used, adding 25 percent of the value of other tenants' uses is no longer appropriate. Rather, Federal appraisal standards and precedent control. Federal appraisal standards give guidance for finding rental values, and they do not suggest that the method for calculating schedule rent is an appropriate measure of a fair market appraisal. * * *

The appraisal at issue in this appeal does not explain any logic to its addition to the fair market rental value of [a] 25 percent rental value per tenant or per tenant use. In the absence of an explanation that would square such a conclusion with established appraisal methodology, we can only guess that the motivation for the added rent for tenant use derived from the rental schedule approach. ^{16/} The rental schedule at 43 CFR 2803.1-2(d) (3) is an alternative to standard appraisals; it does not alter fair market value appraisal methodology. No hybrid appraisal is justified here.

^{16/} We note also that a provision that would have, when determining schedule rent, charged as rental 25 percent of the amount of rental received by a [lessee] from each of its tenants was rejected by the Department during rulemaking. 60 FR 57062 (Nov. 13, 1995).

158 IBLA at 103-04.

We do not question that the rental received by CEC from co-users would affect the fair market value of its lease. However, we require that

this factor be assessed in keeping with governing appraisal practices and standards and that such be clearly stated in any appraisal. Moreover, we deem it arbitrary to use an unexplained 25-percent factor. BIM should take this into account in future estimates and appraisals concerning communication sites.

Having utilized an appraisal that was never intended by the appraiser to determine fair market value to establish fair market value rent, BIM's appraisal methodology was doomed from the outset. It is not surprising that the record does not support its holding herein.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the matter remanded for further action consistent herewith.

David L. Hughes
Administrative Judge

I concur:

Lisa K. Hemmer
Administrative Judge